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**Mail Stop Appeal Brief - Patents**

**Commissioner for Patents**

**P.O. Box 1450**

**Alexandria, VA 22313-1450**

**ON THE DATE NOTED BELOW MY SIGNATURE**

*Rupert B. Hurley Jr.*  
**Rupert B. Hurley Jr.**

2 November 2009

**DATE**

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

**First Named Inventor: Roberto Forloni**

**Group Art Unit: 1794**

**Serial No.: 10/565,868**

**Examiner: Freeman, John D.**

**Filing Date: July 12, 2006**

**Attorney Docket No.: D-43535-01**

**Title: "HIGHLY BIAXIALLY ORIENTED MULTILAYER BARRIER FILM  
WITH PET TYPE RESINS"**

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**Commissioner for Patents**

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**APPEAL BRIEF UNDER 37 CFR § 41.37**

**Sir:**

This Brief is filed further to the Notice of Appeal filed 29 June 2009, which is dated stamped 1 July 2009 by the OIPE. The two-month period for the filing of the brief is extended two months, i.e., through Monday, 2 October 2009, by the accompanying request for a two-month extension of time. Pursuant to 37 CFR §41.20(b)(2), the undersigned authorizes the PTO to charge Deposit Account No. 07-1765 in the amount of the fee for the filing of this appeal brief, as well as the fee for the extension of time.

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(1) Real Party in Interest

The real party in interest is Cryovac, Inc., assignee of the above-referenced patent application.

(2) Related Appeals and Interferences

There are no other appeals, interferences or judicial proceedings known to Appellant, Appellant's legal representative, or Assignee which may be related to, directly affect, be directly affected by, or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The claims on appeal are pending Claims 15-36. Of original claims 1-14, claims 1-13 were directed to a multilayer film, with claim 14 being directed to a process for making a multilayer film. Original claims 1-14 were canceled in a preliminary amendment filed 24 January 2006, with claims 15-36 being newly presented in the preliminary amendment. Claims 15-34 are directed to a multilayer film, with claims 35-36 being directed to a process for making a multilayer film. Claims 15-36 stand as presented in the amendment under 37 CFR 1.111 filed 29 October 2008.

(4) Status of Amendments

The last amendment filed is the amendment filed 31 October 2008. No further amendment has been filed before the filing of the instant appeal brief.

### (5) Summary of the Claimed Subject Matter

As a first aspect, the invention is directed to a multilayer, biaxially oriented, thermoplastic film comprising: (A) a first outer layer comprising at least one member selected from the group consisting of polyester homopolymer and polyester copolymer; (B) a second outer layer comprising at least one member selected from the group consisting of ethylene homopolymer, ethylene copolymer, propylene homopolymer, and propylene copolymer; and (C) a first core layer comprising an ethylene/vinyl alcohol copolymer. [Pages 2-3, paragraph 015] The multilayer film has a modulus, according to ASTM D882, of at least 6,000 kg/cm<sup>2</sup> in at least one direction. [Pages 2-3, paragraph 015] According to the first aspect, there is the further proviso that the multilayer film does not have a core layer containing at least 50 weight percent, based on layer weight, of at least one member selected from the group consisting of polyamide and polyester. [Pages 2-3, paragraph 015, in combination with Page 7, paragraph 047]

As a second aspect, the invention is directed to a process for making a biaxially oriented, thermoplastic multilayer film comprising: (A) coextruding resins through a flat die so that a cast sheet is produced; and (B) orienting the cast sheet in a longitudinal direction and in a transverse direction, with the orientation in the longitudinal and transverse directions being carried out simultaneously, with the ratio of the orientation in the longitudinal direction to the orientation in the transverse direction being at least 2:1, respectively, the orientation being conducted with a tenter frame. [Page 3, paragraph 018] The cast sheet comprises: (i) a first outer layer comprising at least one member selected from the group consisting of polyester homopolymer and polyester copolymer, and (ii) a second outer layer comprising at least one member selected from the group

consisting of ethylene homopolymer, ethylene copolymer, propylene homopolymer, and propylene copolymer, and (iii) a first core layer comprising ethylene/vinyl alcohol copolymer. [Page 3 paragraph 018 in combination with Pages 2-3 paragraph 015]. The multilayer film has a modulus, according to ASTM D882, of at least 6,000 kg/cm<sup>2</sup> in at least one direction. [Page 3 paragraph 018 in combination with Pages 2-3 paragraph 015]. According to the second aspect, there is the further proviso that the multilayer film does not have a core layer containing at least 50 weight percent, based on layer weight, of at least one member selected from the group consisting of polyamide and polyester. [Page 3 paragraph 018 in combination with Pages 2-3, paragraph 015, further in combination with Page 7, paragraph 047]

(6) Grounds of Rejection to be Reviewed on Appeal

- I. Whether Claims 15-18 and 27-28 are anticipated by MURATA et al
- II. Whether Claims 19-26 and 35-36 are obvious over MURATA et al in view of MURSCHALL et al in view of BASSETT et al
- III. Whether Claims 29-31 are obvious over MURATA et al.
- IV. Whether Claim 32 is obvious over MURATA et al in view of LAIRD et al
- V. Whether Claim 33 is obvious over MURATA et al in view of LAIRD et al
- VI. Whether Claim 34 is obvious over MURATA et al in view of BANASZAK et al

(7) Argument

**I. Whether Claims 15-18 and 27-28 Are Anticipated by MURATA et al**

Sections 2-6 of the final Office Action state that Claims 15-18 and 27-28 are anticipated by USPN 4,496,714, to Murata et al. Appellant contends that Murata et al does not anticipate any one or more of Claims 15-18 and 27-28. As to the basis for this contention, one must compare Appellant's claimed invention with the disclosure of Murata et al taken as a whole.

Applicants' independent Claims 15 and 35 each recite a biaxially oriented film comprising the following layer arrangement\*:

First outer layer	First core layer	Second Outer Layer
polyester homo- and/or co-polymer	EVOH	Ethylene and/or propylene homo- and/or co-polymer

\* with the proviso that the multilayer film does not have a core layer containing at least 50 weight percent, based on layer weight, of at least one member selected from the group consisting of polyamide and polyester.

Whether Murata et al anticipates any one or more of Applicants' claims is determined by comparing the disclosure of Murata et al, as a whole, with Applicant's claims. Columns 12 and 13 of Murata et al disclose various multilayer structures, each of which utilizes a special polyester, i.e., an "aluminum atom- and monocarboxylic acid residue-containing polyester". See Abstract of Murata et al.

Column 12 of Murata et al discloses multilayer constructions that have been labeled Structure Nos. 1, 2, 3, and 4 in Table I, below. In Structure Nos. 1-4, the special polyester is present in an internal adhesive layer (i.e., tie layer) of the multilayer construction. Column 13 of Murata et al discloses multilayer constructions that have been designated as Structure Nos. 5, 6, 7, 8, 9, 10, 11, and 12 in the table below. In Structure Nos. 5-12, the special polyester is used as a base layer of the laminate. Table I, below, summaries the various multilayer

constructions of Columns 12 and 13 of Murata et al. Below Table I is information showing the identity of the polymer(s) present in each of the layers of the multilayer constructions of Murata et al.

**Table I**  
**The 12 Multilayer Structures of Columns 12 and 13 of Murata et al**

Structure No.	Location in Murata et al	Multilayer film structure
1	Col. 12 line 46	(B) / (A) / (C)
2*	Col 12 line 50	(B) / (A) / (C) / (D)
3	Col 12 line 52	(B) / (A) / (C) / (A) / (E)
4*	Col 12 line 54	(B) / (A) / (C) / (A) / (E) / (D)
5	Col 13 line 56	(F) / (G)
6	Col 13 line 56	(F) / (G) / (H)
7	Col 13 line 58	(G) / (F) / (I)
8	Col 13 line 59	(I) / (F) / (G) / (H)
9	Col 13 line 60	(F) / (G) / (H) / (G) / (F)
10	Col 13 line 60	(G) / (F) / (I) / (F) / (G)
11	Col 14 lines 1-2	Special polyester / carboxyl-cont'g polymer / EVOH
12	Col 14 lines 3-5	Special / carboxyl- / EVOH / carboxyl- / special polyester cont'g polymer cont'g polymer polyester

(A) = special polyester tie

(B) = adherend = (i) hydroxyl containing polymer, (e.g., EVOH, vinyl alcohol homo- and co-polymers; cellulose); and  
(ii) polyesters; and  
(iii) carboxyl-containing polymer (e.g., maleic anhydride modified polyethylene, maleic anhydride modified EVA, ethylene-acrylic acid copolymer, other olefinic polymers each containing pendent carboxyl groups or anhydride rings); and  
(iv) various metals

(C) = adherend = same as or different from B

(D) = different from that of C (e.g., polyethylene, polypropylene, polyvinylidene chloride, nylon)

(E) = same as or different from (B) and/or (C)

(F) = special polyester base polymer

(G) = carboxyl-containing polymer

(H) = same as or different from (F)

(I) = same as or different from (G)

In assessing novelty, each of Structure Nos. 1-12 is compared with Applicants' invention as claimed in independent claims 15 and 35. Table II, below, provides both a

schematic summary of the multilayer arrangement of Applicant's invention as recited in independent Claims 15 and 35, as well as a compilation of the layers disclosed in Murata et al that may contain one or more polymers that correspond with the polymers in the layers of Applicant's invention.

**Table II**  
**Multilayer Arrangement of Applicant's Claims 15 and 35, and**  
**Corresponding Polymers in Murata et al**

<b>Applicant's Claims 15 and 35</b>			
	Polyester homo- or co-polymer	EVOH	ethylene homopolymer ethylene copolymer propylene homopolymer propylene copolymer
<b>Corresponding Polymers in Murata</b>			
	A, B, F, or H	B, C, or E	D

The condensed summaries in Table II make it relatively easy to assess novelty by comparing each of Murata et al Film Nos. 1-12 with Appellant's independent claims 15 and 35, as is set forth in Table III, below.

**Table III**  
**Novelty Comparison of Murata et al with Applicant's Claims 15 and 35**

<b>Structure No.</b>	<b>Multilayer Constructions of Murata et al</b>	<b>Is the Film of Applicant's Claims 15 and 35 Novel over Murata et al?</b>
1	(B) / (A) / (C)	<b><u>YES</u></b> (1) no EVOH core (2) no outer PE or PP layer
2	(B) / (A) / (C) / (D)	<b><u>NO, BUT ONLY IF:</u></b> (a) B is polyester (1 in 4) (b) C is EVOH (1 in 4 x 1 in 3) (c) D is PE or PP (2 in 4) -and add'l clm rqmnts met
3	(B) / (A) / (C) / (A) / (E)	<b><u>YES</u></b> (3) no outer PE or PP layer

4	(B) / (A) / (C) / (A) / (E) / (D)	<b><u>NO, BUT ONLY IF:</u></b> (a) <i>B is polyester (1 in 4)</i> (b) <i>C is EVOH (1 in 4)x(1 in 3)</i> (c) <i>D is PE or PP (2 in 4)</i> -and the additional claim requirements are met
5	(F) / (G)	<b><u>YES</u></b> (1) no EVOH core (2) no outer PE or PP layer
6	(F) / (G) / (H)	<b><u>YES</u></b> (1) no EVOH core (2) no outer PE or PP layer
7	(G) / (F) / (I)	<b><u>YES</u></b> (1) no EVOH core (2) no outer PE or PP layer (3) no outer polyester homo- or Co-polymer
8	(I) / (F) / (G) / (H)	<b><u>YES</u></b> (1) no EVOH core (2) no outer PE or PP layer
9	(F) / (G) / (H) / (G) / (F)	<b><u>YES</u></b> (1) no EVOH core (2) no outer PE or PP layer
10	(G) / (F) / (I) / (F) / (G)	<b><u>YES</u></b> (1) no EVOH core (2) no outer PE or PP layer (3) no outer polyester homo- or co-polymer
11	Spcl polyester/carboxyl-cont'g polymer/EVOH	<b><u>YES</u></b> (2) no outer PE or PP layer
12	Spcl / carboxyl- / EVOH / carboxyl- / Spcl p-ester cont'g polymer                      cont'g p-ester polymer	<b><u>YES</u></b> (2) no outer PE or PP layer

As can be seen in Table III above, only 2 of the 12 multilayer constructions of Murata et al encompass a combination of layers that corresponds with the combination of layers recited in Appellant's independent Claims 15 and 35. That is, Appellant's Claims 15-18, 27, and 28 are novel over Structure Nos. 1, 3, and 5-12, because the layer constructions of

Structure Nos. 1, 3, and 5-12 do not correspond with Applicant's independent Claim 15. The novelty analysis in the far right column of Table III indicates why each of Structure Nos. 1, 3, and 5-12 do not correspond with Appellant's independent Claim 15.

As for Structure Nos. 2 and 4, at the outset it should be noted that considering Murata et al as a whole, there is only a 2 in 12 chance of selecting Structure No. 2 or Structure No. 4 from Structure Nos. 1-12. It is improper to select portions of Murata et al in isolation, without considering Murata et al as a whole, because one of skill in the art would have had no such guidance to select from the whole of Murata et al at the time of Appellant's invention.

Moreover, even if one does happen to select either Structure No. 2 or Structure No. 4, the multilayer construction has no chance of corresponding with Applicant's independent Claims 15 and 35 unless particular polymer selections are made for each of the layers. More particularly, "polyester" would have to be selected for the B polymer. This is a one-in-four chance, as is apparent from the "B = adherend = (i)... or (ii)... or (iii)... or (iv) set forth below Table I above.

Likewise, "EVOH" would have to be selected for the C polymer. This would be a one-in-twelve chance, because EVOH is a one-in-four selection within groups (i) or (ii) or (iii) or (iv) beneath Table I, and EVOH is a one-in-three chance of being selected from the group of "EVOH, vinyl alcohol homo- and co-polymers, and cellulose".

Still further, "polyethylene" or "polypropylene" would have to be selected for the D polymer. This is a two-in-four chance, as is apparent from the D grouping of "polyethylene, polypropylene, vinylidene chloride, and nylon" below Table I.

In addition, Appellant's independent Claims 15 and 35 each require biaxial orientation. Murata et al discloses both biaxial orientation (Col. 14, line 20), as well as

monoaxial orientation (Examples 17 and 19). As such, one would have to select biaxial orientation from the two disclosed options, which is a one-in-two chance.

In summary of the above discussion, the odds of one of skill in the art reviewing Murata et al and arriving at Appellant's claimed invention are only one in 1152. This is calculated by:

- (a) 2-in-12 chance of selecting Construction Nos. 2 or 4 from Construction Nos. 1-12;
- (b) 1-in-4 chance of selecting polyester for "B";
- (c) 1-in-4 chance of selecting "hydroxyl containing polymer" for "C";
- (d) 1 in 3 chance of selecting "EVOH" from "EVOH, vinyl alcohol homo- and co-polymers, and cellulose;
- (e) 2 in 4 chance of selecting polyethylene or polypropylene for "D"; and
- (f) 1 in 2 chance of selecting biaxially oriented from biaxially oriented and monoaxially oriented.

<b>Taking all of these odds in combination, the result is:</b>
<b>(2 in 12) x (1 in 4) x (1 in 4) x (1 in 3) x (2 in 4) x (1 in 2) = 4 in 4,608 = 1 in 1,152</b>

Applicant contends that a generic disclosure that presents a 1-in-1152 chance of arriving at Applicant's claimed invention is not anticipation of Applicant's claimed invention. That a factual analysis of randomly choosing components from Murata et al generates only a 1-in-1152 chance of arriving at Appellant's claimed invention is a conclusion not disputed by the Examiner. In fact, the Examiner expressly *agrees* with the 1-in-1152 conclusion:

The examiner agrees with Applicant's factual analysis: the odds of randomly choosing the components claimed without regard to any features seems to be one in 1,152. [27 Jan 2009 Final Office Action, page 5, section 36]

The qualification on the agreement that the random choosing must occur "...without regard to any features..." does not change the result, because the office action does not explain why the nature of the feature changes the analysis. In reality, the selections are of the polymeric choices for the particular layer for which the selection is made, and the odds are based on the disclosed selections for each of the layers, so there is no need to "regard" the feature unless there is some disclosure or other knowledge that one polymer cannot be used in one layer in combination with another polymer in another layer. Such facts have not been set forth in the office action, "regarding" the features does not change the 1-in-1152 analysis. In summary, Appellant contends that the above excerpt indicates that the Examiner agrees with the 1-in-1152 analysis upon using random selection.

After expressing agreement on the 1-in-1152 random selection analysis, the Examiner goes on to state that he disagrees with Appellant's ultimate conclusion of 1-in-1152 evidencing novelty, because one of ordinary skill in the art would have been "...unlikely to *randomly* choose each of the components". [27 Jan 2009 Final Office Action, page 5, section 36] In response, Appellant points out that the final office action fails to point to any evidence whatsoever as to *why* one of ordinary skill in the art would have been unlikely to randomly choose each of the components in the film of Murata et al. The statement by the Examiner that the choice of each of the components is unlikely to be made randomly is a conclusion in need of some factual basis. Accordingly, until and unless some basis for other than random selection is shown to be present in the disclosure in Murata et al, Appellant contends that the 1-in-1152 random odds stand in support of the novelty and nonobviousness of Appellant's claimed invention over Murata et al.

The Examiner then goes on to state:

Firstly, such reasoning [referring to the 1-in-1152] necessarily implies that each combination of the 1,152 would be novel and nonobvious, except perhaps for explicitly disclosed examples. However, ‘applicant must look to the whole references for what it teaches. Applicant cannot merely rely on the examples and argue that the reference did not teach others.’ In re Courtright, 377 F.2d 647, 153 USPQ 735,739 (CCPA 1967). [27 Jan 2009 Final Office Action, page 5, section 36]

These comments from the Examiner appear to raise the question of whether Appellant’s arguments focusing on the various *examples* in Murata et al are insufficient arguments because Murata et al discloses subject matter in addition to the various examples, i.e., that Appellant has not considered the “...whole reference for what it teaches.”

In response, Appellant respectfully points out that the entire discussion above of “Structure Nos. 1-12” in Table III above is *not a discussion of the examples in Murata et al which appear at Columns 15-30 of Murata et al*, but rather is a discussion of the *generic disclosure* set forth in Column 12 of Murata et al. This point is even more important upon consideration of the fact that Structure Nos. 1-12 in Table III above is a discussion of those very portions of Column 12 of Murata et al the Examiner relies upon in setting forth the rejection in section 4 of the final office action. More particularly, section 4 of the final office action refers to “col 12 ln 39-56” of Murata et al, “col 12 ln 43-44” of Murata et al, “col 12 ln 1-21” of Murata et al, “col 27 ln 52-54” of Murata et al, and “col 12 ln 50-52” of Murata et al. Upon review, it is clear that Col. 12 of Murata et al is a generic description of the layer arrangements and the various polymers that can be provided in each of the layers. The lone reference to Col. 27 of Murata et al simply shows that Murata et al discloses an aromatic polyester. Thus, contrary to the statements in section 36 of the final office action, it is apparent that Appellant’s arguments do not focus on the examples in Murata et al, but

rather focus on the extent of the generic disclosure in Col. 12 of Murata et al. Appellants contends that the record is clear that the generic teaching in Murata et al generates only a 1-in-1152 chance of arriving at a multilayer structure in accordance with Appellant's claims, and that as a result it is clear that Appellant's claimed subject matter is both novel and nonobvious over Murata et al.

Next, the Examiner states that:

“...the 102 rejection is proper given that, by Applicant's own admission as set forth in Table III and page 15 lines 1-3 of the amendment filed 31 October 2008, Murata does disclose the multilayer thermoplastic film as presently claimed. [27 Jan 2009 final office action, pages 5-6, section 36, emphasis added]

This statement is directed solely to the conclusion of anticipation by admission. A review of the file clearly demonstrates that Appellant has made no admission of anticipation. The examiner directs attention to Table III and page 15 lines 1-3 of the 31 Oct 2008 amendment.

Taking first Page 15 lines 1-3 of the 31 Oct 2008 amendment:

As can be seen in Table III above, only 2 of the 12 multilayer constructions of Murata et al encompass a combination of layers that corresponds with the combination of layers recited in Applicant's independent Claims 15 and 35. [Appellant's 31 Oct 2008 amendment, first three lines following Table III on page 15 of the amendment, emphasis added]

The emphasized language in the excerpt above is not an admission of anticipation. Rather, this statement simply goes to the fact that Murata et al discloses such a broad grouping of films that the group encompasses Appellant's claimed subject matter as set forth in Appellant's independent claims. It is black letter law that a species can be patentable over the disclosure of a genus. There is no admission whatsoever here relating to unpatentability due to anticipation or obviousness. There is merely an admission that 1-in-1152 is a species (i.e.,

the “1) within a disclosed large genus (i.e., the “1152”) of possibilities with the reference providing no express teaching directed to the specific “1” in the “1152”.

As to the Examiner’s contention that Table III provides an admission of anticipation or obviousness, Appellant directs attention to the portion of Table III that appears to be the source of the Examiner’s comment:

Structure No.	Multilayer Constructions of Murata et al	Is the Film of Applicant’s Claims 15 and 35 Novel over Murata et al?
2	(B) / (A) / (C) / (D)	<b><u>NO, BUT ONLY IF:</u></b> <i>(a) B is polyester (1 in 4)</i> <i>(b) C is EVOH (1 in 4 x 1 in 3)</i> <i>(c) D is PE or PP (2 in 4)</i> -and the additional claim requirements are met
4	(B) / (A) / (C) / (A) / (E) / (D)	<b><u>NO, BUT ONLY IF:</u></b> <i>(a) B is polyester (1 in 4)</i> <i>(b) C is EVOH (1 in 4)x(1 in 3)</i> <i>(c) D is PE or PP (2 in 4)</i> -and the additional claim requirements are met

Clearly, neither of these portions of Table III admit anticipation. The “**BUT ONLY IF:...**” portions of Table III clearly dispel any notion of any admission of anticipation or obviousness. The “**BUT ONLY IF:...**” corresponds with the 1-in-1152 analysis the Examiner has expressly agreed to be the random odds of arriving at Appellant’s claimed invention from Murata et al. In summary, the final office action fails to establish how the 31 Oct 2008 amendment sets forth an admission of anticipation or obviousness.

Next, the Examiner sets forth a “small group of choices” rationale:

Given that the choice of layer structure is 2 of 12 and the choice of polymer for each layer is 1 in 4, 1 in 4 by 1 in 3, and 2 in 4, **which do not provide a vast number of choices but rather are each small groups from which to choose**, it is the examiner’s position that the choices that must be made to arrive at the presently claimed invention

*are sufficiently limited or well delineated so as to make the anticipation rejection of record proper.* [27 Jan 2009 final office action, page 6, section 36, emphasis added]

This statement in the final office action does not alter or otherwise affect the significance of the random 1-in-1152 chance of arriving at Appellant's invention through the teaching of Murata et al. If one were to go down a road and come to an intersection with 1,152 separate paths to proceed onward down, with the option of only choosing one path, and with only one path going to the desired location, the odds are clearly only 1-in-1152 that, without guidance, the correct path will be chosen. The result is absolutely no different if a traveler goes down a road and comes to an intersection with 12 choices and only two lead to the desired location, and upon selection of one of those paths the traveler goes onward, down the selected road, and encounters a later intersection offering 4 choices, with only one of the choices enabling the traveler to proceed onward toward the desired location, and then chooses one of the four and goes further and encounter a second one-in-four choice, and then to choose and encounter a one-in-three choice, and then choose and go further and encounter a two-in-four choice... ...well, the story is exactly the same as a single intersection with 1,152 choices: the odds remain precisely the same that the traveler will end up at the desired location: precisely 1-in-1152 under each scenario. The characterization that the selections "*...do not provide a vast number of choices but rather are small groups from which to choose...*" ignores the statistical equivalency that produces the 1-in-1152 result the Examiner has admitted is statistically correct if random selection applies. As to the Examiner's "*...sufficiently limited or well delineated...*" characterization of the small groups of choices, Appellant contends that this characterization attempts to simply discard the certainty of the mathematical nature of the probabilities analysis. The office actions have not set forth any

support for any selection other than random selection. Without such support, anticipation and/or obviousness have not been set forth.

In the amendment filed 31 October 2008, Appellant stated that the office action does not take into consideration whether any of Multilayer Construction Nos. 1-12 exhibits Applicant's recited modulus of at least 6,000 kg/cm<sup>2</sup> in at least one direction. In the final office action, the Examiner responds that "...since Murata's composite is the same as presently claimed, it inherently possesses the modulus properties disclosed by Applicant." [final Office Action, page 6, section 37]

In response, Appellant respectfully points out that since 1-in-1152 does not qualify as anticipation, it is well established that inherency does not apply. Accordingly, the recited modulus is yet another feature in addition to the 1-in-1152.

Appellant's explanation of the applicability of Murata et al to the claims on appeal has been set forth above. The Examiner's "Response to Arguments" stand rebutted. For all of the reasons set forth above, Claims 15-18 and 27-28 are neither anticipated nor rendered obvious by MURATA et al.

## **II. Whether Claims 19-26 and 35-36 are obvious over MURATA et al in view of MURSCHALL et al in view of BASSETT et al**

As the rejection of Claims 19-26 and 35-36 relies upon Murata et al for the combination of features set forth in independent claims 15 and 35, Appellant contends that the rejection of Claims 19-26 and 35-36 as obvious over MURATA et al in view of MURSCHALL et al in view of BASSETT et al should be reversed because no prima facie case of obviousness has been made out for Claims 19-26 and 35-36, for at least the same reasons that no prima facie case of obviousness has been made out for Claims 15

and 35, i.e., the arguments set forth under heading “I”, above. No further arguments are believed to be necessary to establish the patentability of Claims 19-26 and 35-36.

### **III. Whether Claims 29-31 are obvious over MURATA et al.**

As the rejection of Claims 29-31 relies upon Murata et al for the combination of features set forth in independent claims 15 and 35, Appellant contends that the rejection of Claims 29-31 as obvious over MURATA et al should be reversed because no prima facie case of obviousness has been made out for Claims 29-31, for at least the same reasons that no prima facie case of obviousness has been made out for Claims 15 and 35, i.e., the arguments set forth under heading “I”, above. No further arguments are believed to be necessary to establish the patentability of Claims 29-31.

### **IV. Whether Claim 32 is obvious over MURATA et al in view of LAIRD et al**

As the rejection of Claim 32 relies upon Murata et al for the combination of features set forth in independent claims 15 and 35, Appellant contends that the rejection of Claim 32 as obvious over MURATA et al in view of LAIRD et al should be reversed because no prima facie case of obviousness has been made out for Claim 32, for at least the same reasons that no prima facie case of obviousness has been made out for Claims 15 and 35, i.e., the arguments set forth under heading “I”, above. No further arguments are believed to be necessary to establish the patentability of Claim 32.

### **V. Whether Claim 33 is obvious over MURATA et al in view of LAIRD et al**

As the rejection of Claim 33 relies upon Murata et al for the combination of features set forth in independent claims 15 and 35, Appellant contends that the rejection

of Claim 33 as obvious over MURATA et al in view of LAIRD et al should be reversed because no prima facie case of obviousness has been made out for Claim 33, for at least the same reasons that no prima facie case of obviousness has been made out for Claims 15 and 35, i.e., the arguments set forth under heading "I", above. No further arguments are believed to be necessary to establish the patentability of Claim 33.

**VI. Whether Claim 34 is obvious over MURATA et al in view of BANASZAK et al**


As the rejection of Claim 34 relies upon Murata et al for the combination of features set forth in independent claims 15 and 35, Appellant contends that the rejection of Claim 34 as obvious over MURATA et al in view of BANAZAK et al should be reversed because no prima facie case of obviousness has been made out for Claim 34, for at least the same reasons that no prima facie case of obviousness has been made out for Claims 15 and 35, i.e., the arguments set forth under heading "I", above. No further arguments are believed to be necessary to establish the patentability of Claim 34.

**Conclusion**

Appellant respectfully submits that, for all of the foregoing reasons, Claims 15-36 are patentable over the art of record. The rejection of those claims should therefore be reversed, with a view towards allowance.

Respectfully submitted,

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(8) Claims Appendix

Claim 15: A multilayer, biaxially oriented, thermoplastic film comprising:

(A) a first outer layer comprising at least one member selected from the group

consisting of polyester homopolymer and polyester copolymer;

(B) a second outer layer comprising at least one member selected from the group

consisting of ethylene homopolymer, ethylene copolymer, propylene

homopolymer, and propylene copolymer; and

(C) a first core layer comprising ethylene/vinyl alcohol copolymer; and

wherein the multilayer film has a modulus, according to ASTM D882, of at least

6,000 kg/cm<sup>2</sup> in at least one direction, with the proviso that the multilayer film does

not have a core layer containing at least 50 weight percent, based on layer weight, of

at least one member selected from the group consisting of polyamide and polyester.

Claim 16: The multilayer film according to Claim 15, wherein the second outer layer comprises at least one member selected from the group consisting of ethylene homopolymer and ethylene copolymer.

Claim 17: The multilayer film according to Claim 15, wherein the film has a modulus of at least 6,500 kg/cm<sup>2</sup> in at least one direction.

Claim 18: The multilayer film according to Claim 15, wherein the film has a modulus of at least 7,000 kg/cm<sup>2</sup> in at least one direction.

Claim 19: The film according to Claim 15, wherein the film has a total free shrink, at 120 °C, of from about 20 percent to about 140 percent.

Claim 20: The film according to Claim 19, wherein the film has a total free shrink, at 120°C, of from about 30 to about 130 percent.

Claim 21: The film according to Claim 19, wherein the film has a total free shrink, at 120°C, of from about 40 to about 120 percent.

Claim 22: The film according to Claim 19, wherein the film has a total free shrink, at 120°C, of from about 50 to about 110 percent.

Claim 23: The multilayer film according to Claim 19, wherein the film has a maximum shrink tension in the transverse direction of less than 5 kg/cm<sup>2</sup> in the temperature range of from 20°C to 180°C.

Claim 24: The multilayer film according to Claim 23, wherein the film has a maximum shrink tension in the transverse direction of less than 3 kg/cm<sup>2</sup>.

Claim 25: The multilayer film according to Claim 15, wherein the film is a heat-set film and has a total free shrink at 120°C of from 0 to 10 percent in each direction.

Claim 26: The multilayer film according to Claim 25, wherein the film has a total free shrink at 120°C of from 0 to 5 percent in each direction.

Claim 27: The multilayer film according to Claim 15, wherein the first outer layer comprises at least one member selected from the group consisting of (a) polyester homopolymer comprising an aromatic ring and (b) polyester copolymer comprising an aromatic ring.

Claim 28: The multilayer film according to Claim 16, wherein the second outer layer comprises at least one member selected from the group consisting of ethylene homopolymer, heterogeneous ethylene/alpha-olefin copolymer, homogeneous ethylene/alpha-olefin copolymer, ethylene/vinyl acetate co-polymer, ethylene/C<sub>1-4</sub> alkyl acrylate copolymer, ethylene/C<sub>1-4</sub> methacrylate co-polymer, ethylene/acrylic acid copolymer, ethylene/methacrylic acid co-polymer.

Claim 29: The multilayer film according to Claim 15, further comprising:  
(D) a fourth layer which serves as a first tie layer, the fourth layer being directly adhered to both the first outer layer and the core layer; and  
(E) a fifth layer which serves as a second tie layer, the fifth layer being directly adhered to both the second outer layer and the core layer.

Claim 30: The multilayer film according to Claim 15, further comprising:

- (D) a fourth layer which serves as a first tie layer, the fourth layer being between the first outer layer and the first core layer;
- (E) a fifth layer which serves as a second tie layer, the fifth layer being between the second outer layer and the first core layer; and
- (F) a sixth layer which serves as a second core layer, the sixth layer being between the second outer layer and the fifth layer, the sixth layer comprising polyolefin.

Claim 31: The multilayer film according to Claim 30, further comprising:

- (G) a seventh layer which serves as a third tie layer, the seventh layer being between the second core layer and the first outer layer; and
- (H) an eighth layer which serves as a third core layer, the eighth layer being between the second tie layer and the second outer layer, the third core layer comprising polyolefin.

Claim 32: The multilayer film according to Claim 31, further comprising an anti-fog agent in the third core layer.

Claim 33: The multilayer film according to Claim 15, further comprising an anti-fog agent in the second outer layer.

Claim 34: The multilayer film according to Claim 15, wherein the film has been irradiated to a level of from about 10 to about 200 kiloGrays.

Claim 35: A process for making a biaxially oriented, thermoplastic multilayer film comprising:

(A) coextruding resins through a flat die so that a cast sheet is produced, the cast sheet comprising:

- (i) a first outer layer comprising at least one member selected from the group consisting of polyester homopolymer and polyester copolymer;
- (ii) a second outer layer comprising at least one member selected from the group consisting of ethylene homopolymer, ethylene copolymer, propylene homopolymer, and propylene copolymer; and
- (iii) a first core layer comprising ethylene/vinyl alcohol copolymer; and

(B) orienting the cast sheet in a longitudinal direction and in a transverse direction, with the orientation in the longitudinal and transverse directions being carried out simultaneously, with the ratio of the orientation in the longitudinal direction to the orientation in the transverse direction being at least 2:1, respectively, the orientation being conducted with a tenter frame; and

wherein the multilayer film has a modulus, according to ASTM D882, of at least 6,000 kg/cm<sup>2</sup> in at least one direction, with the proviso that the multilayer film does not have a core layer containing at least 50 weight percent, based on layer weight, of at least one member selected from the group consisting of polyamide and polyester.

Claim 36: The process according to Claim 35, further comprising heat-setting the multilayer film.

(9) Evidence Appendix

No evidence described in 37 CFR §41.37(ix) was submitted by Appellant or entered by the Examiner.

(10) Related Proceedings Appendix

There are no other appeals, interferences or judicial proceedings known to Appellant, Appellant's legal representative, or Assignee which may be related to, directly affect, be directly affected by, or have a bearing on the Board's decision in the pending appeal.